



July 17, 2000

Mr. Wiley B. McAfee  
City of Irving  
Police Department  
P.O. Box 152288  
Irving, Texas 75061

OR2000-2688

Dear Mr. McAfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137622.

The Irving Police Department (the "department") received a request for the "records of arrest, charges, bonds" on two named individuals. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, Exhibits B-F.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. You state that the department received the requestor's written request for information on May 10, 2000. You did not request a decision from this office until May 25, 2000, more than ten business days after the department's receipt of the requestor's written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App. -- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App. -- Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Here, section 552.101 presents a compelling reason to overcome the presumption of openness.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information

protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex.1976), *cert denied*, 430 U.S. 931 (1977). As the requestor is asking for the records of “arrest, charges, bonds” of two named individuals, in essence, the requestor is asking the department to compile those individuals’ criminal histories. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Similarly, open records decisions issued by this office acknowledge this privacy interest. *See* Open Records Decision Nos. 616 (1993), 565 (1990). Therefore, the department must withhold all records in which the named individuals are arrestees, possible criminal suspects, or defendants pursuant to section 552.101 of the Government Code. After reviewing the documents, we find that Exhibits B-E are records in which the named individuals are arrestees, possible criminal suspects, or defendants. Therefore, the department must withhold Exhibits B-E in their entirety.

The documents contained in Exhibit F reflect that one of the named individuals is a complainant and not an arrestee, possible criminal suspect, or defendant. Therefore, Exhibit F must not be withheld under section 552.101 and common law privacy. The department claims that the submitted documents may also be withheld pursuant to section 552.108 of the Government Code. However, we note that section 552.108 is a discretionary exception. Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential. Consequently, a governmental body waives a discretionary exception by failing timely to invoke it. *See* Open Records Decision Nos. 630 (1994), 586 (1991), 552 (1990). Therefore, because section 552.108 may be waived, we conclude that section 552.108 does not constitute a compelling reason to overcome the presumption that the requested information is public. Accordingly, the department may not withhold Exhibit F under section 552.108. Thus, the department must release Exhibit F.

However, Exhibit F contains a social security number. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted

on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the records here is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990. We have marked the social security number that appears in Exhibit F.

We also note that Exhibit F contains motor vehicle information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from required public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, under section 552.130, the department must withhold the Texas driver's license number, the VIN number, the license plate number, and other information relating to a driver's license that appear in the submitted documents. We have marked the information that must be withheld pursuant to section 552.130.

In summary, the department must withhold Exhibits B-E in their entirety under section 552.101 and common law privacy. The department must withhold the Texas driver's license number, the VIN number, the license plate number, and other information that relates to a driver's license that appear in Exhibit F pursuant to section 552.130. The department also may have to withhold the social security number contained in Exhibit F in accordance with the above discussion. The department must release the remainder of the documents in Exhibit F.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri  
Assistant Attorney General  
Open Records Division

ncl/nc

Ref: ID# 137622

Encl. Submitted documents

cc: B. Goepfinger  
P.O. Box 117564  
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(w/o enclosures)